

FILE COPY

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF THE DISCIPLINARY	:	
PROCEEDINGS AGAINST	:	
	:	
JOSEPH O. HOFFMAN, D.O.,	:	FINAL DECISION AND ORDER
RESPONDENT	:	91 MED 004

The parties to this action for the purposes of Wis. Stats. sec. 227.53 are:

Joseph O. Hoffman
632 West Fern Drive
Fullerton, CA 92632

Medical Examining Board
P.O. Box 8935
Madison, WI 53708-8935

Department of Regulation and Licensing
Division of Enforcement
P.O. Box 8935
Madison, WI 53708-8935

The parties in this matter agree to the terms and conditions of the attached Stipulation as the final decision of this matter, subject to the approval of the Board. The Board has reviewed this Stipulation and considers it acceptable.

Accordingly, the Board in this matter adopts the attached Stipulation and makes the following:

FINDINGS OF FACT

1. Joseph O. Hoffman (D.O.B. 07/21/42) is duly licensed in the state of Wisconsin to practice podiatric medicine (license # 16885). This license was first granted on July 31, 1969.
2. Dr. Hoffman's latest address on file with the Department of Regulation and Licensing is 632 West Fern Drive, Fullerton, CA 92632.
3. On or about October 20, 1990, The California Board of Osteopathic Examiners took action against the California license of Dr. Hoffman to practice medicine in that state. A true and correct copy of the California order is attached to this Order as Exhibit A. Exhibit A is incorporated by reference into this Final Decision and Order.
4. Dr. Hoffman is currently seeking appellate review of the order referred to in ¶3, above. In resolution of the Wisconsin investigation based upon the October 20, 1990 California order, Dr. Hoffman consents to the

issuance of the following Conclusions of Law and Order.

CONCLUSIONS OF LAW

1. The Wisconsin Medical Examining Board has jurisdiction over this matter, pursuant to §448.02(3), Wis. Stats.

2. The Wisconsin Medical Examining Board is authorized to enter into the attached stipulation, pursuant to §§ 227.44(5) and 448.02(5), Wis. Stats.

3. By the conduct described above, Joseph O. Hoffman is subject to disciplinary action against his license to practice medicine in the state of Wisconsin, pursuant to Wis. Stats. §§ 448.02(3), and Wis. Adm. Code § MED 10.02(2)(q).

NOW, THEREFORE, IT IS HEREBY ORDERED that

1. Dr. Hoffman shall refrain from the practice of medicine and surgery in the State of Wisconsin during the pendency of any appeal arising out of disciplinary action taken against his license in the state of California.

2. The State of Wisconsin Medical Examining Board accepts the SURRENDER of the 1991-93 Wisconsin registration of Joseph O. Hoffman, D.O. (#16885). The surrender of current Wisconsin registration shall continue in effect, and Dr. Hoffman shall not apply for renewal of his Wisconsin registration to practice medicine and surgery, until all appeals relating to the California disciplinary action are concluded (including actions related to any further disciplinary proceedings arising as a result of remand or other action connected with the appellate process), or until the time for filing an appeal from any order relevant to that action has run, whichever is later.

3. Dr. Hoffman shall inform the Wisconsin Medical Examining Board of any decision in the California appellate process within ten (10) days from the date on which a decision is rendered.

4. If the imposition of discipline against Dr. Hoffman's California license is overturned on appeal and no further appeal from the imposition of discipline has or can be taken, the Wisconsin Medical Examining Board shall grant a petition by Dr. Hoffman for return of current Wisconsin registration, upon receipt of appropriate documentation of completion of the California appellate review process.

5. If the imposition of discipline against Dr. Hoffman's California license is upheld on appeal and no further appeal from the imposition of discipline has or can be taken, Dr. Hoffman shall be deemed to have tendered surrender of his Wisconsin license to practice medicine and surgery. The State of Wisconsin Medical Examining Board by this order then accepts the surrender of the license (#16885) of Joseph O. Hoffman, D.O. to practice medicine and

surgery in the State of Wisconsin.

This Order shall become effective upon the date of its signing.

MEDICAL EXAMINING BOARD

By: B. Ann Neviasser
B. Ann Neviasser
Secretary
Medical Examining Board

9-1-92
Date

Post-it™ brand fax transmittal memo 7871		# of pages = 2
To: Dennis Grees	From: Dr. J. Hoffman	
Co.	Co.	
Dept.	Phone #	
Fax # (414) 992-0379		267-2983

STATE OF WISCONSIN
BEFORE THE MEDICAL EXAMINING BOARD

IN THE MATTER OF
DISCIPLINARY PROCEEDINGS AGAINST
JOSEPH O. HOFFMAN,
RESPONDENT

STIPULATION
91 MED 004

It is hereby stipulated between Joseph O. Hoffman, D.O., personally on his own behalf and Steven M. Glee, Attorney for the Department of Regulation and Licensing, Division of Enforcement, as follows that:

1. This Stipulation is entered into in resolution of the pending disciplinary proceedings concerning Dr. Hoffman's licensure. This stipulation and attached order shall be presented directly to the Medical Examining Board for its consideration and adoption.
2. Dr. Hoffman understands that by the signing of this Stipulation he voluntarily and knowingly waives his rights, including: the right to a hearing on the allegations against him, at which time the state has the burden of proving those allegations by a preponderance of the evidence; the right to confront and cross-examine the witnesses against him; the right to call witnesses on his behalf and to compel their attendance by subpoena; the right to testify himself; the right to file objections to any proposed decision and to present briefs or oral arguments to the officials who are to render the final decision; the right to petition for rehearing; and all other applicable rights afforded to him under the United States Constitution, the Wisconsin Constitution, the Wisconsin Statutes, and the Wisconsin Administrative Code.
3. Dr. Hoffman is aware of his right to seek legal representation and has obtained legal advice prior to signing this stipulation.
4. Dr. Hoffman agrees to the adoption of the attached Final Decision and Order by the Medical Examining Board. The parties to the Stipulation consent to the entry of the attached Final Decision and Order without further notice, pleading, appearance or consent of the parties. Respondent waives all rights to any appeal of the Board's order, if adopted in the form as attached.
5. If the terms of this Stipulation are not acceptable to the Board, the parties shall not be bound by the contents of this Stipulation, and the matter shall be returned to the Division of Enforcement for further proceedings. In the event that this Stipulation is not accepted by the Board, the parties agree not to contend that the Board has been prejudiced or biased in any manner by the consideration of this attempted resolution.
6. Attached to this Stipulation is the current licensure card of Joseph O. Hoffman. If the Board does not accept this Stipulation, the license of

Dr. Hoffman shall be returned to him with a notice of the Board's decision not to accept the Stipulation.

7. The parties to this stipulation agree that the attorney for the Division of Enforcement (and, if applicable, the member of the Medical Examining Board assigned as an advisor in this investigation) may appear before the Medical Examining Board in support of this agreement and answering questions that the members of the Board may have in connection with their deliberations on the stipulation.

8. The Division of Enforcement joins Dr. Hoffman in recommending the Medical Examining Board adopt this Stipulation and issue the attached Final Decision and Order.

Joseph O. Hoffman D.O.
Joseph O. Hoffman, D.O.

8/25/92
Date

Dennis K. Ames
Dennis K. Ames, Attorney for
Joseph O. Hoffman

8/21/92
Date

Steven M. Glos
Steven M. Glos, Attorney
Division of Enforcement

8/26/92
Date

BEFORE THE
BOARD OF OSTEOPATHIC EXAMINERS
STATE OF CALIFORNIA

In the Matter of the Accusation
Against:

JOSEPH ORVILLE HOFFMAN, D.O.
632 West Fern Drive
Fullerton, CA 92632

Osteopathic Physician's
License No. 20A 3492

Respondent.

No. 89-2

OAH NO.: L-47159

DECISION

The attached Proposed Decision of the Administrative Law
Judge is hereby adopted by the BOARD OF OSTEOPATHIC
EXAMINERS as ITS Decision in the above-entitled
matter.

This Decision shall become effective on November 20, 1990.

IT IS SO ORDERED October 20, 1990.

BOARD OF OSTEOPATHIC EXAMINERS
OF THE STATE OF CALIFORNIA

By: 

OAH 15 (Rev. 6/84)

EXHIBIT A

BEFORE THE
BOARD OF OSTEOPATHIC EXAMINERS
STATE OF CALIFORNIA

In the Matter of the Accusation)	
Against:)	No. 89-2
)	
JOSEPH ORVILLE HOFFMAN, D.O.)	OAH NO.: L-47159
632 West Fern Drive)	
Fullerton, CA 92632)	
)	
Osteopathic Physician's)	
License No. 20A 3492)	
)	
Respondent.)	
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PROPOSED DECISION

On June 11, 12, 13, 1990, and July 2, 3, 5, and 6, 1990, in San Bernardino, California, Alan S. Meth, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter. Robert McKim Bell represented complainant. Dennis K. Ames represented respondent. Evidence was received and the record remained open for the receipt of additional evidence and briefs. A certified copy of a marriage certificate was received on July 31, 1990, and marked Exhibit 21, and admitted into evidence. A closing brief from respondent was received on July 23, 1990, and marked Exhibit S. A Post-hearing Memorandum of Points and Authorities from complainant was received on August 21, 1990, and marked Exhibit 22. A Reply Brief from respondent was received on August 24, 1990, and marked Exhibit T. The record was closed and the matter was submitted.

FINDINGS OF FACT

I

Linda J. Bergman, Executive Officer of the Board of Osteopathic Examiners, State of California (hereinafter, "Board"), filed this accusation in her official capacity.

II

Respondent Joseph Orville Hoffman, D.O. (hereinafter, "respondent"), was issued license number 20A3492 on November 10, 1974, and at all relevant times, the license was in full force and effect.

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III

Tina C. was married on August 27, 1988, in Las Vegas, Nevada. She was 18 years old. She married Arthur C., with whom she had been living. She was about two months pregnant then, and on April 23, 1989, had her baby. She first thought she was pregnant, and that was confirmed by her gynecologist, in July, 1988.

The morning after her wedding, August 28, 1988, Tina C. awoke to find that she was bleeding between her legs. The bleeding was heavy and the blood ran down her legs. She told her step-mother what was happening; her step-mother thought Tina C. might be having a miscarriage. Tina C. and her husband decided to drive home. During the six to seven hour drive home, Tina C. continued to experience bleeding.

They arrived at their home in Pomona, which they shared with Arthur's parents, at about 6:45 p.m. While she was there, Tina C. experienced nausea and felt faint. She was scared and sick. After a discussion with Arthur's parents, it was decided that Tina C. would go to the nearest medical facility, Doctor's Hospital of Montclair. She arrived shortly before 7:00 p.m. and was seen by respondent in the emergency room a little while later.

Tina C. was taken to a small examination room within the emergency room of the hospital, where she disrobed, put on a cotton top, covered herself with a sheet, and lay down on an examination table. Respondent and a nurse entered the room. Tina C. told him that she was married, was bleeding, was about two months pregnant, and was worried about a miscarriage. Respondent quickly performed a pelvic examination: he had Tina C. lay on her back and place her feet in the stirrups, he put on a pair of gloves and lubricating jelly, inserted a speculum, and examined her vaginal area. After he finished, he told Tina C. that he was not sure how much blood she had lost, her cervix was closed, and he needed to have blood tests performed. Respondent told Tina C. to get some and rest, and left.

Tina C. was left alone for about 40 to 45 minutes, except for a short period of time when a lab technician entered the room and drew blood. Respondent returned alone. He held a paper in his hand and told Tina C. that he was not sure what was going on and needed to perform another examination. He said he needed to determine the size of her uterus but he did not say why.

With Tina C. on her back and respondent at her side, respondent placed one hand on her abdomen below her navel, did not move it, and with the other hand, began to rub the outer portion of her vagina. He had neither gloves nor lubricating jelly. Tina C.'s feet were flat on the table, not in the

stirrups, and her knees were bent. Respondent said that he wanted Tina C. to "self-stimulate" to see if her uterus went into a spasm, and placed his right hand inside her vagina. Tina C. did not understand this remark but did not ask respondent what it meant. When Tina C. did say she felt embarrassed and uncomfortable, respondent told her to close her eyes and take deep breaths to relax. She did close her eyes for a few seconds. He also told Tina C. that she was nervous and tense and needed to relax.

The second examination lasted about three to five minutes. During this time, respondent rubbed her vaginal area for a long time and told Tina C. to raise her pelvis and move her hips from side to side in conjunction with his fingers. Respondent said this would also help her relax. When Tina C. did not move her hips, respondent exerted pressure on her left hip with his left hand in an effort to have Tina C. move her hips. While he was doing this, respondent's eyes were closed and he was standing close to the examination table with his groin pressed up against the table. To Tina C., respondent appeared to be sexually aroused.

At one point during this second examination, the door opened, and a nurse and Tina C.'s mother-in-law appeared in the doorway. Tina C. called her mother-in-law's name. However, they left the room quickly.

After the second examination was finished, Tina C. began to get dressed. While she dressed, respondent leaned against a counter and watched her. He then told her she should stay off her feet and see her doctor. He did not tell her why she was bleeding.

Tina C. left the hospital and discussed what had occurred during the second examination with her mother-in-law. Tina C. decided to go to the police. She went to the Montclair Police Department that night and was interviewed by a police officer.

IV

It was not established that respondent engaged in clearly excessive administering of treatment, use of diagnostic procedures, or use of diagnostic or treatment facilities in connection with his treatment of Tina C.

V

On September 15, 1983, Teresa M., then 28 years old, went to respondent at his medical office, known as Immedicare, 861 W. Lambert, Brea, California. She had been admitted to Brea Community Hospital through the emergency room in August, 1983, suffering from, among other things, lethargy and anemia, and was

seen there by respondent and Dr. Ricketts. She went to respondent's office on September 15 to find out the results of the tests done on her in the hospital and to find out what was wrong with her.

After signing in, Teresa M. was taken to an examination room. She was not asked to sign, and did not sign, any document agreeing to have a gynecological examination performed by respondent without a nurse present. When the examination began, a nurse was present. Respondent obtained a Pap smear, gave the specimen to the nurse, and told her she was not needed any longer.

Respondent then began an examination. Respondent said that Teresa M. was congested and he was going to "self-stimulate" her so she would "self-lubricate." This would allow her to relax so that respondent could touch her ovaries. He did not perform a pelvic examination and did not touch her ovaries. Instead, he began rubbing Teresa M.'s abdomen near her pubic area with his left hand. He rubbed in a circular motion. With his right hand, respondent manipulated the outer area of Teresa M.'s vagina, and it was sexually stimulating her.

At about this point, respondent said that Teresa M.'s estrogen level was elevated and as a result, her sex drive was high, and most women enjoyed this procedure. Teresa M. said she could not relax. Respondent told her to close her eyes, but she refused. Respondent continued to rub her vaginal area, including the lips and clitoris, and as he did so, his eyes appeared to glaze over. Respondent became sweaty and his eyes rolled back. When Teresa M. saw this, she became uncomfortable and sat up. She told respondent to stop. Respondent then withdrew his hand and left the room. Teresa M. sat there for a long time and when no one came in, she got dressed and left.

Some time later, Teresa M. called respondent and voiced her objection to what he did. She accused him of wrongdoing and suggested he get therapy. Respondent replied that he was sorry but acted as if nothing happened. He mentioned that Teresa M. had deep emotional problems which he learned of from a conversation with Teresa M.'s husband.

VI

On October 17, 1983, before Teresa M. filed any complaint regarding respondent with the Board, respondent wrote a letter to the Board (Exhibit 12). In that letter, respondent wrote that Teresa M.'s husband called that day to ask for help concerning Teresa M.'s "bizarre behavior." As described by respondent to the Board, Teresa M. (according to her husband) threatened to kill herself, cut up bedsheets into ribbons, was obsessed with sexual thoughts, and her family history included sexual rapings

by members of her family. Respondent also wrote that Teresa M. had "recruited two other disturbed friends and mean to take this" to the Board.

It was not established that Teresa M. was suffering from any of the problems described in the letter, and respondent's explanation that these problems were told to him by Teresa M.'s husband is not credible.

VII

On October 25, 1983, Teresa M. signed a "Consumer Complaint Form" (Exhibit 8) and submitted it to the Board. In the form, Teresa M. in a cursory manner complained of the examination performed on her by respondent. She also submitted an authorization for release of information to the Board. On November 2, 1983, a letter was written by Gareth J. Williams, then Executive Director of the Board, transmitting Teresa M.'s authorization for release of information and requesting copies of her patient file for review by the Ethics Committee of the Board (Exhibit 18). On November 17, 1983, respondent wrote a letter to the Board in which he enclosed copies of Teresa M.'s "reports." (Exhibit 13). He included a copy of a Pap smear and an office note of the September 15, 1983, examination. He did not refer to, and did not submit to the Board, any document signed by Teresa M. in which Teresa M. agreed to be examined by respondent without the presence of a nurse. The testimony of respondent, Carol Hoffman, and Peggy Steadman that there is a document in respondent's medical chart in which Teresa M. agreed to be examined without the presence of a nurse is not credible.

The Ethics Committee of the Board reviewed the complaint of Teresa M. and decided to interview respondent. The Committee met on March 2, 1984, and interviewed respondent regarding the complaint of Teresa M. The Committee did not interview Teresa M. It then concluded that it could find no evidence to proceed further with administrative action, and recommended to the Board that the case be dropped for lack of substantial evidence, and the Board accepted the recommendation.

By letter dated March 12, 1984, Mr. Williams advised respondent that the Committee recommended that the file be purged of the complaint and no further action be taken. It also recommended to respondent that for all future patients undergoing a physical examination, he have a female employee present.

VIII

It was not established that respondent engaged in clearly excessive administering of treatment, use of diagnostic procedures, or use of diagnostic or treatment facilities in connection with his treatment of Teresa M.

IX

Since becoming licensed in 1974, respondent has emphasized obstetrics and gynecology, and family practice. He has delivered more than 300 babies. He has worked for and with other doctors over the years, worked in hospitals, and maintained his own office, or an office in partnership with other doctors, for about ten years.

In 1982, respondent opened an office in Brea which he called Immedicare. It was a family practice, and it was while he operated this practice that he saw Teresa M. and Elizabeth C. (See infra.) The office closed in 1986. Respondent retired from general practice in 1988.

DETERMINATION OF ISSUES

I

Cause for discipline of respondent's license was established for violation of Business and Professions Code section 726, by reason of Finding III.

II

Cause for discipline of respondent's license was not established for violation of section five of the Osteopathic Act, by reason of Finding IV.

III

Cause for discipline of respondent's license was established for violation of Business and Professions Code section 726, by reason of Finding V.

IV

Cause for discipline of respondent's license was not established for violation of section five of the Osteopathic Act, by reason of Finding VIII.

V

The complainant on the third day of the hearing sought to introduce the testimony of Elizabeth C. Objection was made on the ground that the proffered testimony would be inadmissible under Evidence Code section 1101. It was determined at that time that the testimony would be heard under Evidence Code sections 403-405, and a determination made later as to whether the evidence would be admitted.

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The testimony of Elizabeth C. established the following:

On January 31, 1983, Elizabeth C., then 27 years old, went to respondent's office, Immedicare, in Brea, for a routine Pap smear. She had been seen by respondent before as a patient.

Elizabeth C. was taken to an examination room at respondent's office, where she put on a gown. Respondent entered the room; there was no nurse present. He had her lay down on a table and place her feet in the stirrups. He inserted something into her vagina, felt her stomach, and asked if that hurt. He removed the object from her vagina and placed his hand inside her vagina. With his other hand, he massaged her stomach. He was rough with her, and it hurt. He told Elizabeth C. to relax. He also told her she had a tilted uterus. As he massaged her stomach and exerted pressure on her, with his other hand either outside or inside her vagina, respondent rubbed his body against Elizabeth C.'s leg and hip, and against the side of the table. He rocked back and forth in a methodical, repetitive manner. While he did this, his eyes were closed, and he was perspiring. This examination lasted about four or five minutes. To Elizabeth C., respondent was turned on and it did not appear respondent was looking for anything.

Elizabeth C. did not report this incident to the Board in 1983.

Respondent testified that he did not recall Elizabeth C. However, he did produce some of her records.

Evidence Code section 1101 provides:

"(a) Except as provided in this section and in Sections 1102 and 1103, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

"(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

"(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness."

Respondent maintains that the testimony of Elizabeth C. is inadmissible because such evidence constitutes inadmissible character evidence, is not relevant, and even if relevant, such relevance is outweighed by its prejudicial effect. Complainant argues the evidence is admissible as constituting either evidence of common design or plan, or establishing respondent's intent or motive.

The admissibility of evidence of other sex crimes has been addressed in innumerable criminal cases, and those cases have a significant bearing on the resolution of this issue in this proceeding. Admission of evidence of prior and uncharged sex crimes in criminal cases depends on three principal factors:

"(1) the materiality of the fact sought to be proved or disproved; (2) the tendency of the uncharged crime to prove or disprove the material fact; and (3) the existence of any rule or policy requiring exclusion of relevant evidence." (People v. Thompson (1980) 27 Cal.3d 303, 315 (emphasis in original).)

Since section 1101 is a rule of exclusion unless an exception under subsection (b) applies, it is incumbent upon complainant to articulate a ground for admissibility of Elizabeth C.'s testimony. Complainant sets forth two grounds: common design or plan, and intent or motive. The first is without merit. In People v. Tassell (1984) 36 Cal. 3d 77, 83-89, the Supreme Court addressed extensively the rationale for admissibility of evidence of other sex crimes, where the basis was common plan or design. The Court there held that such evidence should be excluded where there was no material issue regarding identity. The Court called such evidence "a euphemism for 'disposition'." Id. at 89. In the process, the Court disapproved many of the cases relied upon by complainant to support admission of the Elizabeth C. evidence in this case.

Identity was not an issue in this case. Respondent never claimed that he did not examine either Tina C. or Teresa M. He admitted to examining both of them. Whether he conducted proper examinations, or whether he conducted improper examinations, are the issues presented here. Accordingly, it is determined that the Elizabeth C. evidence is not admissible to prove common plan or design. These matters were not material to this case.

Nor was respondent's intent or motive. If Tina C. and Teresa M. are believed, what respondent did during the examinations of the two patients constituted sexual misconduct. If respondent's version of what occurred is believed, no sexual misconduct occurred. Although counsel for respondent at one point argued that respondent's actions could be considered innocent even if the patients' versions are believed, in effect, reconciling the varying testimony, such an argument is

unavailing. What respondent did is the only issue, and whether he committed a similar examination on a previous occasion does not assist in resolving this issue. What it may show is that respondent is predisposed to committing such acts, and was more likely to commit acts of sexual misconduct during the examinations of Tina C. and Teresa M. because of his conduct with Elizabeth C., but such a rationale does not render the evidence admissible.

Not only was the Elizabeth C. evidence not material, it did not have a tendency to prove intent even if intent were in issue. The properly admitted evidence, based upon the charges contained in the accusation, was that on two occasions, during examinations of two patients, respondent committed acts which, if the patients are believed, constituted sexual misconduct. The credibility of the two patients, and respondent, are in issue. The testimony of Elizabeth C. merely adds a third act and another witness. However, for the testimony of Elizabeth C. to aid in resolving what transpired regarding Teresa M. and Tina C., the very same credibility issues must be resolved first. Since there was no independent corroboration of what occurred during the Elizabeth C. examination, e.g. an independent percipient witness, an admission or confession by respondent, a conviction or judgment, etc., it must be concluded that the allegations of Elizabeth C. do not have a tendency to prove any material fact. For these reasons, the testimony of Elizabeth C. is not admitted. People v. Tassell, supra.

VI

Respondent filed a Notice of Defense pursuant to Government Code section 11506, but did not file one under subsection (5) which permits a respondent to present new matter by way of defense. Respondent moved to amend his Notice of Defense to permit the introduction of evidence to support a defense of laches. Under Code of Civil Procedure section 576, an amendment of any pleading may be granted before or after the commencement of trial. Under Government Code section 11506, an agency has the authority to grant a hearing even if a respondent has not filed a Notice of Defense, and an agency may permit a respondent to file a notice late. In addition, the agency may amend an accusation of the accusation after the matter has been submitted for decision. Govt. Code section 11516.

In light of the discretion granted to both courts and agencies to permit the amendments of pleadings even after trial has begun, it would be manifestly unfair to prevent respondent from litigating his laches defense. The motion was made at the beginning of the hearing. Although complainant opposed the motion, and continues to oppose it, there is no evidence that complainant was prejudiced by an amendment. It is inconceivable that complainant would not anticipate that a laches defense would

be raised in this case, particularly in light of the Board's actions in 1984. Moreover, complainant never requested additional time to investigate the issue, and in fact presented evidence from the Board's file on the issue. The motion is granted.

VII

Respondent argues that the charges against him involving Teresa M. should be dismissed on the ground of laches. Disciplinary action must be prosecuted within a reasonable time after the discovery of the facts constituting the reason for the action. If the time between discovery of the facts by the administrative agency and the commencement of the disciplinary proceedings is unreasonable, then the proceedings should be dismissed if the respondent has been prejudiced by the delay. (Gates v. Department of Motor Vehicles (1979) 94 Cal.App.3d 921.)

Teresa M. was seen by respondent in September, 1983, and she complained to the Board by filing a consumer complaint in October, 1983. Between November, 1983, and March, 1984, the Board, through its Executive Director and its Ethics Committee, conducted an investigation into the allegations made by Teresa M. in her complaint. On March 12, 1984, the Ethics Committee concluded that there was no evidence to proceed further and recommended to the Board that the matter be dropped for lack of substantial evidence. The Board accepted this recommendation, and advised respondent that the Ethics Committee recommended the file be purged of this complaint and no additional action be taken.

In 1983, the Board had before it a complaint from a patient alleging sexual misconduct during an examination by her doctor. The Board then heard respondent's side. During this period, the Board did not obtain any evidence to support the allegations of wrongdoing. There were no other percipient witnesses known at that time and no other evidence which might corroborate the patient.

It is observed that allegations of sexual misconduct by a physician are very difficult to prove. The actions occur in private and are usually reduced to a determination of who is telling the truth: the patient or the physician. Given that the burden of proof in a proceeding such as this is clear and convincing evidence to a reasonable certainty (Ettinger v. Board of Medical Quality Assurance (1982) 135 Cal.App.3d 853, 855), it is in the best interests of both the doctor and the public that only accusations which can be proven be brought by the administrative agency. An administrative agency which exercises its discretion by refraining from bringing charges against a physician when the facts may not be sustained is to be applauded, not condemned.

The Board in this matter exercised its discretion in an appropriate manner in 1984. However, in 1988, when it learned of the Tina C. case, the status of the Teresa M. case changed. It was entirely proper for the Board at that point to conclude that the testimony of Tina C. would corroborate that of Teresa M., and vice versa. (People v. Moon (1985) 165 Cal.App.3d 1074, 1079.) The case involving Teresa M. became much stronger at that point, and turned into a case which had to be prosecuted, along with the case involving Tina C. Under these circumstances, this case is not one of delay as in Gates, but is one where, although the Board knew of the Teresa M. allegations in 1983, it could not in good faith bring charges until 1988.

Nevertheless, respondent might still be entitled to relief if he could demonstrate prejudice, but he failed to do so. The most important piece of information alleged to have been lost since 1983 concerns a written waiver by Teresa M. to have a nurse present during her examination. The testimony supporting the existence of this document is not credible. If it had existed, respondent would have transmitted it to the Board in 1984 with the other records he provided to the Board and would have referred to it in his cover letter. He did neither of these things. The Board retained custody of the copies of the documents respondent transmitted to it in 1983, and had all of them except this alleged waiver. It is unlikely that the Board would have lost this singular document while retaining the rest.

Moreover, respondent failed to undertake any diligent effort to retrieve his own file. His efforts consisted of having his wife call an office which had purchased his practice and speaking to a nurse who said the office did not have his files. It was not established that the failure of respondent to obtain his medical files was the result of the passage of time.

Respondent maintains that a crucial witness who could not be located was the husband of Teresa M. and attributes this to the passage of time. Again, there was no evidence of any effort made by respondent to locate him, and there was no competent evidence introduced as to where he was then residing or what he was then doing.

Although it is true that the passage of time has resulted in the two percipient witnesses to the examination, respondent and Teresa M., forgetting some of the details of the examination, it is found that their memories were sufficiently strong to permit them to describe what occurred and to be effectively cross-examined.

The motion to dismiss the allegations in the accusation relating to respondent's treatment of Teresa M. on the grounds of laches is denied.

VIII

The Board in its letter to respondent in March, 1984, advised respondent that there was a recommendation that its file would be "purged." This action was not defined, and is not based upon any statute or regulation controlling the actions of state administrative agencies in general, or the Board in particular. If it could be construed in any way to assist respondent at this point, it is in the sense that it caused him to rely upon this action. (See Brown v. State Personnel Board (1985) 166 Cal.App. 3d 1151.) However, there is no credible evidence that respondent relied upon the Board's purging of his file.

The motion to dismiss the allegations in the accusation relating to respondent's treatment of Teresa M. on the grounds of the statement that the file would be purged is denied.

IX

Respondent maintains that the testimony of the Board's expert, Dr. Missanelli, should be stricken because it was offered in violation of Health and Safety Code section 1799.110. That section requires that in any action for damages involving a claim of negligence against a physician and surgeon arising out of emergency medical services, only testimony from certain medical experts is admissible. Since this case did not involve an action for damages and there was no claim of negligence, section 1799.110 is not applicable. Nor is there any reason offered why the provisions of this statute should be extended to this proceeding.

X

All motions and arguments not affirmed or denied herein, or on the record, are found not to be established by the facts or law and are accordingly denied. All factual allegations of the parties not hereinabove found to be true are found to be unproved.

PROPOSED ORDERS

License No. 20A3492 issued to respondent Joseph O. Hoffman, D.O. is revoked pursuant to Determination of Issues I and III separately and for all of them. However, the revocation is stayed and respondent is placed on probation for ten (10) years on the following terms and conditions:

1. As part of probation, respondent is suspended from the practice of medicine for six months from the effective date of this Decision.

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2. During probation, respondent shall have a third party present while examining or treating female patients.
3. Within 90 days of the effective date of this Decision, and on an annual basis thereafter, respondent shall submit to the Board for its prior approval an educational program or course, which shall not be less than 40 hours per year, for the first three years of probation. This program shall be in addition to the Continuing Medical Education requirements for re-licensure. Following the completion of each course, the Board or its designee may administer an examination to test respondent's knowledge of the course. Respondent shall provide proof of attendance for 65 hours of continuing medical education of which 40 hours were in satisfaction of this condition and were approved in advance by the Board.
4. Within 30 days of the effective date of this Decision, and on a periodic basis thereafter as may be required by the Board or its designee, respondent shall undergo a psychiatric evaluation by a Board-appointed psychiatrist who shall furnish a psychiatric report to the Division or its designee.


If respondent is required by the Board or its designee to undergo psychiatric treatment, respondent shall within thirty (30) days of the requirement notice submit to the Division for its prior approval the name and qualifications of a psychiatrist of respondent's choice. Upon approval of the treating psychiatrist, respondent shall undergo and continue psychiatric treatment until further notice from the Board. Respondent shall have the treating psychiatrist submit quarterly status reports to the Board.

Respondent shall not engage in the practice of medicine until notified by the Division of its determination that respondent is mentally fit to practice safely.

5. Respondent shall obey all federal, state and local laws, and all rules governing the practice of medicine in California.
6. Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Board, stating whether there has been compliance with all the conditions of probation.

7. Respondent shall comply with the Board's probation surveillance program.
8. Respondent shall appear in person for interviews with the Board's medical consultant upon request at various intervals and with reasonable notice.
9. The period of probation shall not run during the time respondent is residing or practicing outside the jurisdiction of California. If, during probation, respondent moves out of the jurisdiction of California to reside or practice elsewhere, respondent is required to immediately notify the Board in writing of the date of departure, and the date of return, if any.
10. Upon successful completion of probation, respondent's certificate will be fully restored.
11. If respondent violates probation in any respect, the Board, after giving respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an accusation or petition to revoke probation is filed against respondent during probation, the Board shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

Dated: Sept 13, 1990


ALAN S. METH
Administrative Law Judge
Office of Administrative Hearings

ASM:ss

NOTICE OF APPEAL INFORMATION

**(Notice of Rights for Rehearing or Judicial Review,
the times allowed for each, and the identification
of the party to be named as respondent)**

The following notice is served on you as part of the final decision:

1. Rehearing.

Any person aggrieved by this order may petition for a rehearing within 20 days of the service of this decision, as provided in section 227.49 of the Wisconsin Statutes, a copy of which is attached. The 20 day period commences the day after personal service or mailing of this decision. (The date of mailing of this decision is shown below.) The petition for rehearing should be filed with the State of Wisconsin Medical Examining Board.

A petition for rehearing is not a prerequisite for appeal directly to circuit court through a petition for judicial review.

2. Judicial Review.

Any person aggrieved by this decision has a right to petition for judicial review of this decision as provided in section 227.53 of the Wisconsin Statutes, a copy of which is attached. The petition should be filed in circuit court and served upon the State of Wisconsin Medical Examining Board

within 30 days of service of this decision if there has been no petition for rehearing, or within 30 days of service of the order finally disposing of the petition for rehearing, or within 30 days after the final disposition by operation of law of any petition for rehearing.

The 30 day period commences the day after personal service or mailing of the decision or order, or the day after the final disposition by operation of the law of any petition for rehearing. (The date of mailing of this decision is shown below.) A petition for judicial review should be served upon, and name as the respondent, the following: the State of Wisconsin Medical Examining Board.

September 8, 1992.

The date of mailing of this decision is _____.